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Interstate Controversies in the Supreme Court of the United States.

BY JUSTICE BROWN OF THE SUPREME COURT
OF THE UNITED STATES (RETIRED).

Address delivered at the Conference of the Society for the Judicial Settlement of International Disputes, at Washington, December 16, 1910.

It is scarcely too much to say that this country is the home of modern international arbitration, as it certainly is the birthplace of the international court. Not that the idea of international arbitration is a recent one. Indeed, it has been the dream of political reformers from the time the first glimmerings of Greek philosophy and civilization began to dispel the darkness with which ancient, and particularly Oriental, barbarism had overspread the earth. It was frequently resorted to in disputes between the Grecian States and was not unknown even in Asia Minor. Thucydides quotes with approval a remark of the King of Sparta, that it is impossible to take as a transgressor him who offers to lay his grievance before a tribunal of arbitration. The Amphictyonic Council, whose functions were chiefly religious, did something to mitigate the horrors of war by providing that the cities of the League should not be burned, destroyed or deprived of their water supply in time of war.

By the Romans arbitration was uniformly refused. As Rome aspired to be the sovereign of the world, she treated other nations not as equals, but rather as suppliants for her mercy, and regarded it as beneath her dignity to submit her claims to the bar of international justice.

During the Middle Ages and the preponderance of papal authority, the Church arrogated to itself the right to act as arbiter of all disputes between nations, and even to parcel out newly discovered lands and allot them to sovereigns at its pleasure. Be it said to their credit, the voice of the Popes was generally for peace, and through their influence arbitral clauses were sometimes inserted in treaties between European powers, and were occasionally appealed to for the settlement of international disputes.

It was not until the seventeenth century — over two thousand years after the famous remark of the King of Sparta quoted by Thucydides — that the question of a general arbitral tribunal, in which all the nations of the world should take part, was even broached by political writers. Curiously enough, two books upon this subject appeared almost contemporaneously, one by Emeric Crucé, a French writer, in 1623, and the other by Grotius, the great Dutch publicist, who, in 1625, put forth his great work upon the law of war and peace, which for nearly three hundred years has been treated as the foundation of the modern science of international law. In this he advocated congresses of Christian states at which international controversies shall be decided by disinterested powers with authority to compel the parties to accept peace on equitable terms. Crucé's project was more definite. He proposed the establishment at Venice of an assembly of ambassadors of all the nations of the world, Oriental as well as Occidental, who should settle all international disputes. Nothing, however, came of these proposals, although individual cases between the powers involving generally pecuniary claims, questions of boundary and of navigation of internal waters, were frequently submitted to disinterested parties.

It is to the eighteenth and nineteenth centuries, and largely to the initiative of this country, that the world is indebted for the most important steps in the direction of a general arbitral tribunal.

The creation of the Supreme Court of the United States was in itself almost an epoch. It demonstrated for the first time that a court may be established with power to adjudicate all claims between independent States, and for this purpose it possesses all the prerogatives of an international court. In estimating the value of its work, it must not be forgotten that the American colonies were separate and self-governing communities, with little more than a nominal dependence upon the mother country; and that since the Articles of Confederation the States have continued to be separate and independent, with full rights of sovereignty, except so far as each has delegated to the general government certain powers essential to a unified existence. As early as 1781, and during the Revolutionary War, it was held in Pennsylvania that the property of the Commonwealth of Virginia was not liable to attachment in Pennsylvania, upon the ground that a sovereign state could not be sued, or its property attached, in Pennsylvania, for a debt due to one of its citizens. It is then as a congeries of independent and autonomous states that we are to consider the question on judicial arbitrament of controversies before them.

The Articles of Confederation were the genesis, but not the foundation, of the present national government. They did not constitute a government in the ordinary sense, but were a mere league between the States for their common defense, the security of their liberties and their mutual and general welfare. As little power as possible was given to the Union; as much as possible was reserved to the States. There was, however, a reservation to Congress of "an appeal in all disputes and differences between two or more States concerning boundary, jurisdiction or any other cause whatever," and an elaborate provision made for the exercise of this authority through commissioners or judges to be chosen by the parties or appointed by Congress. In view of the indefinite and sometimes conflicting limits of the early royal grants, it is manifest that some method of delimiting their respective boundaries and of adjusting overlapping claims was one of the first necessities which would confront them in a new country. The colonies were widely separated at first, and there was little opportunity for friction. Each one had its headquarters or capital town, and between them were vast wildernesses, densely forested in some places and inhabited only by Indians and an occasional settler. Their roads were often little more than paths through the woods. There were none but local manufactures, practically no commerce, and but little intercourse between them. Such commerce as they had was carried on by sea, and principally with the mother country. Under such circumstances the fixing of exact boundary lines between the colonies was of little practical importance. But as their population and their mutual jealousies increased their territorial claims expanded, the situation became acute, and by the time of the Revolution some mode of fixing the limits of each became imperative.

To meet this exigency, the ninth Article of the Confederation, already quoted, was adopted. Several actions were begun, but only one proceeded to judgment. This was a controversy between Connecticut and Pennsylvania

over the Wyoming Valley, originally settled by colonists from Connecticut, which was found incapable of adjustment, and had resulted in an actual war in which stockades and forts were erected, sieges undertaken, lives lost and prisoners taken. For ten years Connecticut remained in possession, until a force of five hundred men was levied to drive them out.

Upon the organization of the Confederacy a court was appointed to sit at Trenton to try the case, which, after a full hearing and fifteen days of argument, was unanimously decided in favor of Pennsylvania. Both States appear to have acquiesced in the decision, though the proprietors of the soil under grants from Connecticut resisted the claims of Pennsylvania almost to the point of actual hostilities. This was the first judgment of the international court. Other cases arose between Pennsylvania and Virginia; New Jersey and Virginia, over "a tract of land called Indiana"; Massachusetts and New York; South Carolina and Georgia; New Hampshire, New York and Massachusetts against Vermont,—all of which were settled in the preliminary stages. At the time of the adoption of the Constitution, there were existing controversies between eleven of the thirteen States respecting the boundaries under their charters, which had continued from the first settlement of the colonies.

The provisions of the Articles of Confederation were superseded after a brief existence of eleven years by the much more comprehensive provisions of the Constitution, which created a Supreme Court and declared that it should have exclusive jurisdiction of cases "in which a State shall be a party."

Few cases seem to have arisen in the early years of the government between the States, under the provisions of the Constitution vesting original jurisdiction in the Supreme Court, although in a large number of cases between private parties the Supreme Court had had occasion to pass upon interstate questions, to settle the respective powers of a State and of the general government, and in fact, under the leadership of Marshall, had clothed the Constitution, which was a mere skeleton, with flesh and blood, and made of it an operative government. Aside from two boundary cases,—one between New York and Connecticut, in 1799, and another between New Jersey and New York, in 1829, neither of which seems to have been determined upon the merits,—it was not until 1833 that the great case of Rhode Island against Massachusetts,¹ which may be called the foundation case upon this branch of the law, came up for adjudication. It was before the court and reported seven times. The bill was filed to determine the northern boundary of Rhode Island, both sides claiming under certain royal charters. It appeared that a line had been fixed by commissioners mutually appointed in 1642, a stake set up as the true boundary, and the report of the commissioners approved by both States. The question of the jurisdiction of the court over contracts between States was elaborately argued by counsel, and fully sustained by the court, and has never since been doubted. It was further held that the fixing of a boundary between States by a court was a judicial and not a political act, although upon this point Chief Justice Taney dissented, holding that, as Rhode Island claimed no property in the soil, but merely sovereignty and jurisdiction, it was purely a political question.

(To be continued.)

New Books.

THE GREAT ILLUSION. By Norman Angell. New York and London: G. P. Putnam's Sons. 1910. 388 pages.

"The Great Illusion" is an expansion of Mr. Angell's former book, "Europe's Optical Illusion." The smaller work was at once recognized as one of the most important publications on the question of war and armaments within recent years. To meet the popular demand, it has been enlarged and is being published in several countries simultaneously.

Mr. Angell makes it the object of his book to dispel certain illusions which have beset the great powers of the world within the last generation. He shows that, contrary to the doctrines of certain statesmen, nations with comparatively small military forces are stronger than those that are heavily armed and prepared for war. He shows this by a comparison of the market value of their investment securities and bonds. Norway is thus made out to be stronger than Russia, Belgium than Germany. He also shows that there is no such thing as gaining a nation's wealth and markets by conquest. The land, the property, the markets still belong to the people who have been conquered, as in the case of Alsace-Lorraine, which was taken over by Germany after the Franco-Prussian war. Furthermore, much of the cost of conquest comes out of the conqueror. Even an indemnity, if exacted, is paid quite as much by the conqueror as by the defeated nation. Germany has had to pay a large share of the indemnity that she exacted from France. This economic situation is due to the fact that within a few years the relations of nations in respect to trade and finance have become interdependent.

Following out this line of argument the author, who has in mind the talk of war between Germany and England, shows that if a raid were made by the army of Germany on the Bank of England, the financiers of Berlin, as well as of London, would be thrown into a state of panic. Germany could gain nothing commercially by conquering England, even if this were possible, as Germany would injure its own customer and impoverish itself.

Mr. Angell deals successfully with another illusion, namely, that human nature does not change. He shows that, contrary to the popular belief upon which militarists base their argument against the pacifists, it does change. Within a few centuries nations have risen from a state of feudalism into a far better social and political order; within a hundred years slavery has been abolished, the duel has gone out of existence, and piracy has become extinct. We have also got beyond fighting for religious creeds. A spirit of tolerance has taken the place of the old religious wars of the time of the Reformation. Everywhere physical force is a diminishing factor and brain force the coming power. Society is classifying itself no longer by states, but by financial, industrial and other interests. All these new conditions must be taken into account when a nation considers the problem of war; they may be utilized to meet the present difficulty with the question of armament, and particularly the strain that has been felt in Anglo-German relations. The author, as Dr. Walter Walsh pointed out in his address at the New England Peace Congress, fails to take note of some

¹ 12 Pet. 713; 4 How. 491